

**IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.**

CWP No.                39 of 2006  
Reserved on:        14.5.2007  
Date of decision    28.5.2007

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| <b>Manoj Kumar Sharma</b>      | <b>Versus</b> | <b>...Petitioner.</b> |
| <b>H.R.T.C. &amp; another.</b> |               | <b>...Respondents</b> |

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*Coram*

**The Hon'ble Mr. Rajiv Sharma, J.**

*Whether approved for reporting ?<sup>1</sup>.yes.*

**For the petitioners :        Mr. B.N. Misra, Advocate.**

**For the respondents :       Mr. H.S. Rawat, Advocate.**

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**Rajiv Sharma, J.**

This petition has been filed against the award dated 31.12.2003 passed by the Presiding Judge, H.P. Labour Court, Shimla in reference No. 227 of 2003.

The brief facts necessary for the adjudication of this petition are that the appropriate Government had made a reference to the H.P. Labour Court, Shimla to the effect that whether the retrenchment of the petitioner is effected without complying the provisions of the Industrial Disputes Act, 1947. In sequel to the reference, the petitioner had filed the statement of claim before the Labour Court and the respondent-corporation had also filed reply to the statement of claim. First appointment letter issued in favour of the petitioner was dated 25.1.2000 whereby he was engaged for a period of 89 days @ Rs.2000/- per month vide Annexure P-1. The petitioner was again re-engaged as Part Time Worker (Peon) for a period

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<sup>1</sup> *Whether the reporters of Local Papers may be allowed to see the judgment?*yes

of 89 days with effect from 22.4.2000 vide office order dated 22.4.2000 (Annexure P-2). The General Manager (Administration) of the respondent-corporation has issued letter dated 1.8.2000 whereby the necessary sanction of the competent authority for re-engagement of the petitioner as well as one Sh. Mehar Singh, Chowkidar as Part Time Class-IV for a period of one year was conveyed. Thus, the total period was for 18 months with effect from 21<sup>st</sup> January, 2000 onwards. The petitioner was retrenched in the month of December, 2001 and according to him, the provisions of section 25 (F) of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) were not complied with. The case set out by the respondent-corporation before the Labour Court was that the engagement of the petitioner was contractual and thus section 25 (F) could not be invoked by the petitioner. The learned Labour Court has held that the appointment of the petitioner was for a specific period and thus he could not claim the protection of section 25-F of the Act and the reference accordingly was replied in negative.

Mr. B.N.Misra, Advocate appearing on behalf of the petitioner has strenuously submitted that the petitioner had completed 240 days preceding 12 calendar months at the time of his retrenchment and was entitled to the protection of section 25-F of the Act. Mr. Misra has also drawn the attention of this Court to one communication dated 29.3.2001 circulated by the Managing Director of the Corporation to all the Divisional Managers of the Corporation, specifically directing them that the services of the workman were to be dispensed with forthwith as no longer required if the workman was going to complete 240 days during the current sanction/extended period. This was issued under the head "89 days". According to Mr. B.N. Misra, the issuance of this communication dated 27<sup>th</sup> March, 2001 (Annexure P-7) amounts to unfair labour practice.

Mr. H.S. Rawat, Advocate appearing on behalf of the respondent-corporation has supported the award passed by the Labour Court.

I have heard the parties and perused the record.

It is evident from Annexure P-3 dated 1.8.2000 that sanction was accorded for re-engagement of the petitioner as well as one Sh. Mehar Singh Part Time Chowkidar. Shri Mehar Singh was also retrenched with effect from December, 2001 and in his case also, the Government has made a reference to the Labour Court to the following effect:

**“Whether the termination of services of Sh. Mehar Singh S/O Sh. Molak Ram, Workman by 1. The Managing Director, H.R.T.C Shimla-3. 2. The Regional Manager, H.R.T.C. Local Unit, Dhalli, Shimla<sup>12</sup> w.e.f. December, 2001 without complying the provisions of the Industrial Disputes Act, 1947 is proper and justified? If not, to what relief of service benefits and amount of compensation Shri Mehar Singh is entitled to?”**

The learned Labour Court came to the conclusion that the workman i.e. Sh. Mehar Singh has been retrenched without following mandatory provisions of Industrial Disputes Act, 1947 and had consequently directed the re-instatement of Shri Mehar Singh by restricting his claim of back-wages from the date of reference i.e. with effect from 11.7.2003. The respondent-corporation filed a CWP No.1260/2005 petition before this Court assailing the award dated 28.8.2005 in favour of Shri Mehar Singh. This Court on 30.12.2005 has dismissed the petition holding therein that the workman was engaged for a period of one year and H.P. Labour Court-cum-Industrial Tribunal, Shimla has not committed any error in its award in favour of Shri Mehar Singh. The writ petition was dismissed by this Court on 30.12.2005. The respondent-corporation has also filed civil review No. 4 of 2006 seeking review of the judgment passed in CWP No. 1260/2005 on 30.12.2005. The Civil review No. 4/2006 was dismissed by this Court on 10.4.2007. The judgment of the CWP bearing No. 1260 of

2005 and the order passed in civil review on 10.4.2007 have been supplied to this Court during the course of hearing, which have been taken on record.

The Labour Court in the same facts and circumstances has passed an award in favour of Shri Mehar Singh on 23.8.2005, which was upheld by this Court in its judgment dated 30.12.2005 and the review petition was also dismissed on 10.4.2007. The engagement of the petitioner and Sh. Mehar Singh was on the basis of Annexure P-3 dated 1.8.2000 and before that they were engaged for 89 days respectively. The petitioner in the present case has admittedly completed 240 days preceding his retrenchment in the month of December, 2003. The petitioner had been engaged initially for a period of 89 days and fictional breaks. were given to him and he was engaged for 89 days on 22.4.2000 and thereafter he was engaged for a further period of one year on 1<sup>st</sup> August, 2000. The Labour Court has failed to take into consideration that the engagement of the petitioner was for more than 240 days preceding his retrenchment. The Labour Court has wrongly applied the provisions of section 2 (oo) (bb) of the Industrial Disputes Act, 1947 qua the petitioner. The fictional breaks given to the petitioner after 89 days amounts to unfair labour practice. The Managing Director of respondent-corporation has directed all the Divisional Manager to ensure that the workman engaged for 89 days be not permitted to complete 240 days. In the present case despite the issuance of communication dated 29.3.2001, the petitioner had completed 240 days preceding his retrenchment.

This Court has viewed the case from another angle also i.e. the same and similarly situated workmen cannot be treated differently on the same facts. The workmen had been appointed on the basis of Annexure P-3 and in the case of Mehar Singh, the award has been made in his

favour and upheld by this Court but in the case of the petitioner the award is answered in the negative on the same facts. Since the award dated 23.8.2005 has been upheld by this Court in case of Shri Mehar Singh, This Court is also inclined to agree with the findings recorded by the Labour Court in case of Mehar Singh on the same facts vis-à-vis the findings recorded by the learned Presiding Judge in his award qua the petitioner. Thus, the petitioner is also entitled to be treated at par with Shri. Mehar Singh whose award has been upheld by this Court on 30.12.2005 and the review has also been dismissed.

The Hon'ble Supreme Court had termed the confidential circular of Reserve Bank of India directing officers by confidential circular that Tikka Mazdoors, persons helping examiners of notes/coins, should not be engaged continuously but offered work on rotation basis amounting to unfair labour practice. Their Lordships of the Hon'ble Supreme Court have held in **H.D. Singh V. Reserve Bank of India**, AIR 1985 LAB. I. C. 1733 as under:

**“Not being satisfied with the pleas noted above the respondent-bank had also a case that the appellant was only a badli workman who could be deemed to have worked only on days when the permanent workman or probationer was not employed. The bank did not make available before the Tribunal any documentary evidence to show as to how the appellant could be treated as a badli worker and as to whose place he occupied during the days he worked. The confidential circular directing the officers that workman like the appellant should not be engaged continuously but should as far as possible, be offered work on rotation basis and the case that the appellant is a badli worker, have to be characterized, as unfair labour practice. The 5<sup>th</sup> Schedule to the Industrial Disputes Act contains a list of unfair labour practices as defined in Section 2(ra). Item 10 reads as follows:**

**“To employee workman as ‘badlis’, casual or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent workmen.”**

**We have no option but to observe that the bank, in this case, has indulged in methods amounting to unfair labour practice. The plea that the appellant was a badli worker also has to fail.”**

In the present case, the Managing Director of the respondent-corporation had issued letter Annexure P-7 whereby all the Divisional Managers had been directed to ensure that the workmen are not permitted to complete 240 days by resorting to giving them fictional breaks. The workman had been engaged initially for 89 days and thereafter for further period of for 89 days and then was engaged for one year. The letter dated 27<sup>th</sup> March, 2001 amounts to unfair labour practice.

The Division Bench of Allahabad High Court has held in **Shailendra Nath v. Vice Chancellor, Allahbad University** 1987 LAB I.C. 1607 that section 2 (oo) (bb) is in the nature of an exception to S. 2 (oo) and has to be construed strictly and in favour of the workman as the entire object of the Act is to secure a just and fair deal to them. Their Lordships of the Allahabad High Court have held as under:

**”The expression, ‘termination for whatsoever reason’ used in Cl. (oo) came up for interpretation before the Supreme Court in State Bank of India V. N.S. Money, AIR 1976 SC 1111: (1976 LAB IC 769). It was held to mean a termination which takes place either by active step of employer or by running out of stipulated period. The Hon’ble Court observed, ‘Termination embraced not merely the act of termination by the employer but the fact of termination, however, produced’. Since this wide interpretation resulted in extending benefit of retrenchment to even those workmen who were engaged for a specific purpose or particular job or were casual workers the Legislature appears to have added sub-cl. (bb) to Cl. (oo) in 1984. Even though petitioners claim to have acquired status**

of regular employees before the clause was amended as each of them had completed 240 days prior to its addition in 1984 it may be examined if the petitioners can be said to be contractual employees as contemplated in this sub-clause. For that it is necessary to examine its scope and ambit. It may, however, be stated at the outset that it obviously attempts to exclude that which otherwise would have been included in principal clause or to be more precise is in the nature of an exception, therefore, it has to be construed strictly and in favour of workmen as the entire objective of the Act is to secure just and fair deal for them. Terminations which are included in it are those which are brought about either because of non-renewal of contract or because of expiry of time stipulated in agreement. The meaning is plain and simple. But in a society with so wide a gap where bargaining power of employee is nil who is exposed to exploitation the nature of employment cannot be judged on the letter issued by the employer but on the nature of duties performed. For instance workers employed for doing a particular job which may be for more than 240 days can be said to be covered by this clause as their engagement comes to an end because of completion of work. Similarly a workman employed for a stipulated period or completion of work whichever may be earlier may be covered in this clause. But if contractual employment is resorted to as a mechanism to frustrate the claim of employee to become regular or permanent against a job which continues or the nature of duties is such that the colour of contractual engagement is given to take it out from the principal clause then such agreements shall have to be tested on the anvil of fairness and bona fide. An agreement for arm twisting or to perpetuate the policy of hire and fire cannot be deemed to be included in Cl. (bb). Because if it is left to the employer not to renew contract whenever he likes irrespective of any circumstances then the protection afforded to a workman by treating every termination of service as retrenchment shall be rendered nugatory. It has to be confined to those limited cases where either the work or post ceases to exist or job comes to an end or the agreement for a

specific period was bonafide. It cannot be extended to such cases where the job continues and the employee's work is also satisfactory but periodical renewals are made to avoid regular status to the employees. That would be unfair labour practice (See H.D. Singh V. Reserve Bank of India, (1985) 51 Fac LR 494 : (1985 Lab IC 1733) (SC). From various annexures filed with affidavits it is clear that some of the petitioners were employed as Office Assistant, other book binders and peons. They were awarded benefit of bonus. They have been working for nearly five years. Their job was not casual, seasonal or of a daily worker. They have not been paid their salary on volume of work. Although the wages in some cases are computed on per day basis but the payment is monthly including holidays. Their duty, therefore, was like a regular employee and not as casual, daily or seasonal worker."

The Hon'ble Single Judge of the Bombay High Court in Dalip H. Shirke V. Zilla Parishad Yavatmal 1990 LAB I.C. 100 has held that employment for fixed period whenever resorted to by the employer as a device to escape applicability of clause (oo), Court must examine the same. The Hon'ble Single Judge has held as under:

"What is necessary to decide is the scope and ambit of the amended sub-cl. (bb) of Clause (oo) of S. 2 of the Industrial Disputes Act. S.2 (oo) after amendment reads as under:-

"S. 2(oo) "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action, but does not include,-

(a) voluntary retirement of the workman; or

(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of

such contract being terminated under a stipulation in that behalf contained therein; or

(C) termination of the service of a workman on the ground of continued ill-health.

The expression “termination by the employer of the service of a workman for any reason whatsoever” has been interpreted by the Supreme Court in the case of *State Bank of India v. N. Sundaramoney*, 1976 Lab IC 769. The words “for any reason whatsoever” were given the widest meaning admitting of no exception. It further observes that whatever the reason, every termination spells retrenchment. A termination can take place either by active step of the master or running out of the stipulated term. Therefore, what emerges from the decision is that the termination embraces not merely the act of termination of the employer but the fact of termination howsoever produced. To make appointments for specific periods did not absolve the management from complying with the conditions stipulated under S. 25-F of the Industrial Disputes Act at the time the period of employment comes to an end. The benefit of law laid down by the Supreme Court was extended to all the workmen, even to those who were employed for specific work or for a particular job and even to casual labourers who were engaged merely to complete casual nature of work. It appears that the Legislature with the intention to protect a class employment enacted one more exception to Cl. (oo) of S. 2 by introducing sub-cl. (bb) in addition to the three already existing. The said sub-clause takes out a class of employment from the definition of “retrenchment” and that class is where the termination of service is on account of non-renewal of a service contract between the workman and the employer or where contractual employment comes to an end on the basis of stipulation contained therein. The exception as contained in sub-cl. (bb) will have to be strictly construed as it takes away certain rights of workmen which such workmen have been enjoying earlier to the amendment.

“As stated above, the terminations which are included in sub-cl. (bb) are those which are brought about either

because of non-renewal of the contract or because of expiry of time stipulated in the contract of employment. It needs no further explanation but the probability of the employer exploiting the labour by giving fixed tenure appointments can never be overruled and, therefore, it would be improper and unwise simply to decide the nature of employment on the basis of letter of appointment issued by the employer. The nature of employment will have to be determined with reference to the nature of duties performed by the workman and type of job the workman was entrusted with. If the workman is engaged to do a particular job which may require him to do actual work for more than 240 days in twelve calendar months, such employment would be covered by the amended sub-clause because the employment comes to an end with the completion of the work. A stipulation in the contract that the employment would be for a specific period or till completion of the work may also fall within the scope and ambit of this sub clause. But if the employer resorts to contractual employment as a device to simply take it out of the principal Cl. (oo) irrespective of the fact that the work continuous of the nature of duties which the workman was performing are still in existence, such contractual engagements will have to be tested on the anvil of fairness, propriety and bonafides. May be that such fixed tenure employments are made to frustrate the claim of the workman to become regular or get himself confirmed as a permanent employee either under the Rules applicable to such employment or even under the Standing Orders. It is always open to the Court adjudicating the dispute to examine each and every case in its proper perspective and to protect the workman against the abuse of the amended provision. If this protection is not afforded, the benefit flowing from retrenchment, to which every termination succumbs, would be rendered nugatory. The amended sub-clause (bb) would apply only to such cases where the work ceases with the employment or

the post itself ceases to exist or such other analogous cases where the contract of employment is found to be fair, proper and bonafide. To a certain extent, I am also supported in my view by the decision reported in the case of **Shailendra Nath Shukla v. Vice Chancellor, Allahabad University, 1987 Lab IC 1607.**”

The High Court of Kerala in **Jay Bharat Printers & Publishers Pvt. Ltd. Vs. Labour Court, Koshikode & others**, 1994 Vol.2 Labour Law Journal 373 had the occasion to consider the true import of section 2 (oo) (bb) and has held that exclusion of section 2 (oo) (bb) cannot be used by periodical renewal of contract of employment to frustrate benefits from section 25-F. The Hon’ble Single Judge of High Court of Kerala has held as under:

“In a similar situation, a Division Bench of the Allahabad High Court examined the scope of section 2(oo) (bb). In the course of judgment the Court observed that the nature of employment must be judged by the nature of duties performed and not on the letter issued by the employer, that if contractual employment is resorted to as a mechanism to frustrate the claim of the employee to become regular or permanent against a job which continues or the nature of duties is such that colour of contractual agreement is given to take it out from Section 2 (oo), then such agreement cannot be regarded as fair or bona fide and that Section 2 (oo) (bb) cannot be extended to such cases where the job continues and the employee’s work is also satisfactory but periodical renewals are made to avoid regular status to employees. I am in respectful agreement with the view expressed in these decisions. Section 2 (oo) (bb) has to be strictly interpreted and it is necessary to find out whether the letter of appointment is a camouflage to circumvent the provisions of the Industrial Disputes Act which confers the benefit of permanency on workers who worked continuously for a period of more than 240 days.”

The Division Bench of Hon'ble Punjab and Haryana High Court in Bhikhu **Ram Vs. P.O. Industrial Tribunal-cum-Labour Court, Rohtak** , 1995 LAB I.C. 2448 has held as under:

**“A minute analysis of Section 2 (oo) along with its various clauses shows that even after 18.8.1984 termination of service of a workman will be treated as retrenchment except where such termination of service falls within one of the following categories:-**

- (i) termination of service as a punishment inflicted by way of disciplinary action;**
- (ii) voluntary retirement of the workman;**
- (iii) retirement of the workman on his attaining the age of superannuation in terms of the contract of employments;**
- (iv) termination of service on account of non-renewal of contract of employment after the same has expired;**
- (v) termination of contract in accordance with the stipulation contained in the contract of employment itself; and**
- (vi) termination of service on the ground of continuous ill-health of the workman.**

The aforesaid six categories can appropriately be termed as exceptions to the definition of ‘retrenchment’ as contained in the principal Section 2 (oo). Being exceptions to the general rule, they have to be strictly interpreted keeping in view the wider literal meaning given to the definition of ‘retrenchment’ in State Bank of India v. N. Sundara Money, AIR 1976 SC 1111:1976 Lab IC 769 (supra), which has been approved by the Constitution Bench in Punjab Land Development and Reclamation Corporation’s case JT 1990 (2) SC 489 (supra). The Court has also to keep in mind the basic cannot of interpretation which has been applied while interpreting the social welfare legislations, including the Industrial Disputes Act. The Courts have time and again held that welfare statutes must receive the construction which advances the object of the statutes and protects the weaker section of the society. This principal has been applied for

interpretation of the term 'Industry' in *State of Bombay v. Hospital Mazdoor Sabha*, AIR 1960 SC 610: 1960-1 Lab LJ 251 and *Banglore Water Supply and Sewerage Board v. A. Rajappa*, AIR 1978 SC 548: 1978 Lab IC 467 (supra). Similar approach has been adopted for interpretation of the term 'retrenchment' in a large number of cases to which reference has been made hereinabove. In *S.K. Verma v. Industrial Tribunal-cum-Labour Court*, AIR 1981 SC 412:1981 Lab IC 1292 (supra), the Supreme Court has observed:-

“Welfare statutes must, of necessary, receive a broad interpretation. Where legislation is designed to give relief against certain kinds of mischief, the Court is not to make inroads by making etymological excursion.”

Therefore, while interpreting and applying various parts of Section 2 (oo), the competent Court/Tribunal shall have to keep in mind the provisions of Section 2 (ra) read with Section 25T and U and various paragraphs of the Fifth Schedule and if it is found that the action of the employer to engage a workman on casual basis or as a daily-wages or even on temporary basis for long periods of time with intermittent breaks and subsequent termination of service of such workman on the pretext of non-renewal of contract of employment or termination of contract of employment on the basis of a stipulation contained therein is an act of unfair labour practice, such an action of the employer will have to be nullified and the Court will be fully justified in rejecting the plea of the employer that termination of service of the workman does not amount to retrenchment but is covered by clause (bb). In the context of various paragraphs of the Fifth Schedule, clause (bb) which is an exception to the principal section will have to be given a narrow interpretation. This clause has the effect of taking away a right which was vesting in the workman prior to its insertion. Therefore, the same cannot be allowed to be used as a tool of exploitation by the employer who, as already observed above, enjoys a position of dominance as against the workman. The employer is always in a position to dictate the terms of service vis-à-vis the workman or to be workman. The employer can unilaterally

impose oppressive and unreasonable conditions of service and the workman will be left with little choice but to accept all such conditions. The employee cannot possibly protest against the incorporation of arbitrary unreasonable and even unconscionable conditions of service in the contract of employment. Any such protest by the employee or a to be employee will cost him job or a chance to enter employment. In respect of a work of permanent or continuing nature, the employer can always give an employment of fixed term or incorporate a condition in the contract of employment/appointment letter that the employment will come to an end automatically after a particular period or on the happening of a particular event. In such a situation, if the Court finds that the conditions are arbitrary and unreasonable and the employer has forced these conditions upon a workman with the sole object of avoiding his obligation under the Industrial Disputes Act, a bald plea of the employer that the termination of service is covered by clause (bb) will be liable to be rejected.”

Therefore, in every case of termination of service of a workman, where the workman claims that he has worked for a period of 240 days in a period of twelve months and termination of his service is void for want of compliance with the requirement of section 25F and where the employer pleads that termination of service has been brought about in accordance with the terms of contract of employment or termination is as a result of non-extension of terms of employment, the Court will have to carefully scrutinize all the facts and apply the relevant provisions of law. It will be the duty of the court to determine the nature of employment with reference to the nature of duties performed by the workman and the type of job for which he was employed. Once the employees established that he was employed for a work of permanent/continuous nature and that employer has arbitrarily terminated his service in order to defeat his rights under the Industrial Disputes Act or other labour legislations, a presumption can appropriately be drawn by the Court that the employer’s action amounts to unfair labour practice. In such a

case, burden will lie on the employer to prove that the workman was engaged to do a particular job and even though the employee may have worked for 240 days such employment should be treated as covered by the amended clause because the service was terminated on the completion of the work. A stipulation in the contract that the employment would be for a specified period or till the completion of a particular job may legitimately bring the termination of service within the ambit of clause (bb). However, if the employer resorts to methodology of giving fixed term appointment with a view to take it out of the section 2 (oo) and terminate the service despite the continuity of the work and job requirement, the court may be justified to draw an inference that the employers' action lacks bona fide or that he has unfairly resorted to his right to terminate the service of the employee."

Applicability of clause (bb) has been considered by different High Courts, including this court. In *Shailendra Nath Shukla v. Vice Chancellor, Allahabad University*, 1987 Lab IC 1607 (All) termination of service of a workman who had served as daily wager for a period of five years and whose contract of service was renewed every three months, by clause (bb) by the Allahabad High Court. A Division Bench of that Court held that section 2 (oo) and has to be construed strictly in favour of workman's the entire object of the Act is to secure a just and fair deal to them. It was further held that section 2 (oo) (bb) cannot be extended to such cases where the job continues and the employees' work is also satisfactory but periodical renewals were made to avoid regular status to employees. That would be unfair practice. In *Dilip Hanumanatrao Shirke v. Zila Parishad, Yavatmal*, 1990 Lab IC 100 (Bom), a learned Judge of the Bombay high Court considered a case where the workman was appointed as a Sanitary Inspector on 9.1.1986 and his appointment will be for relevant months ending on 30.11.1986 or for such further period or till select list of the candidates is received by the office. His service was terminated with effect from 30.11.1986. While the workman pleaded that he had worked for more than 240 days and as there was violation of section 25F, he was entitled to be re-

instated, the employer invoked clause (bb). While upholding the claim of workman, the Bombay High Court set aside the award of the Labour Court and doing so it observed:-

“But if the employer resorts to contractual employment as a device to simply take it out of the principal clause (oo) irrespective of the fact that the work continues or the nature of duties which the workman was performing are still in existence, such contractual engagements will have to be tested on the anvil of fairness, propriety and bona fides. May be that such fixed tenure employments are made to frustrate the claim of the workman to become regular or get himself confirmed as a permanent employee either under the Rules applicable to such employment or even under the Standing Orders. It is always open to the Court adjudicating the dispute to examine each and every case in its proper perspective and to protect the workman against the abuse of the amended provision. If this protection is not afforded, the benefit flowing from retrenchment, to which every termination succumbs, would be rendered nugatory. The amended sub-clause (bb) would apply only to such cases where the work ceases with the employment or the post itself ceases to exist or such other analogous cases where the contract of employment is found to be fair, proper and bonafide.”

From the above, it is clear that termination of service of a workman, who has worked under an employer for 240 days in a period of twelve months preceding the date of termination of service will ordinarily be declared as void if it is found that the employer has violated the provisions of S. 25-F(a) and (b). If the employer resists the claim of the workman and invokes S. 2 (oo) (bb), burden lies on the employer to show that though the employee has worked for 240 days in twelve months prior to termination of his service, such termination of service cannot be treated as retrenchment because it is in accordance with the terms of the contract of employment or on account of non-renewal of the contract of employment. It has had been employed for a specified work and the job which was being

performed by the employee is no more required. Only a bona fide exercise of right by an employer to terminate the service in terms of the contract employment or for non-renewal of the contract will be covered by clause (bb). If the Court finds that the exercise of rights by the employer is not bona fide or the employer has adopted the methodology of fixed term employment as a conduct or mechanism to frustrate the rights of the workman, the termination of the service will not be covered by the exception contained in clause (bb). Instead the action of the employer will have to be treated as an act of unfair labour practice, as specified in the Fifth Schedule of the Act. The various judgments rendered by the different High Courts and by the Supreme Court clearly bring out the principle that only a bona fide exercise of the powers by the employer in cases where the work is of specified nature or where the temporary employee is replaced by a regular employee that the action of the employer will be upheld. In all other cases, the termination of service will be treated as retrenchment unless they are covered by other exceptions set out hereinabove.

We may now revert back to the facts of this case. Admittedly, the petitioner had served for about three years. The work against which the petitioner had been engaged was not of a specified nature or of fixed duration. That work did not cease to exist on the date of termination of service of the petitioner. The job which was being performed by the petitioner continued to be required by the employer. This has been conclusively established that the employer did engage two persons after termination of the petitioner's service. The reason for the termination of the service of the petitioner held out by Sahib Ram in his statement, namely, that the workman had committed embezzlement in 1986, is patently false because after 1986 the petitioner continued to be employed for one year. Therefore, the allegation of embezzlement could not be related to the termination of service of the workman brought about on 24.6.1987. In view of all this, it must be held that the employer has not exercised his right to terminate the service of the petitioner in good faith. Rather the power

vesting in the employer to dictate the terms of employment has been misused by it. Merely because the petitioner accepted the oppressive, unreasonable and arbitrary conditions of service, he cannot be denied relief despite the fact that the respondent-society committed a patent violation of section 25-F. In our considered view the award passed by the Labour Court suffers from an error of law and deserves to be set aside.”

The Madhya Pradesh High Court has held in **Ramkishan v. Samrat Ashok Technical Institute, Vidisha**, 1995 Vol.1 Labour Law Journal as under:

“The exception occurring in Clause (bb) of Section 2 (oo) of the Act is limited to those cases where the work itself is of temporary character and was over. Only in those circumstances, the employer could employ the workman with the bona fide and genuine intentions for satisfying the temporary need and those cases could only fall within the excepted category. Section 2 (oo) has to be read as a whole and construed to carry forward the spirit of I.D. Act meant for avoiding the exploitation of workman in the garb of contractual obligations as restricted interpretation of the exception clause, the scope for principal clause appearing in section 2 (oo) of the Act, to operate in the intended field.”

The Hon'ble Supreme Court has held **in Haryana State Electronics Development Corporation Limited V. Mamni**, (2006) 9 SCC 434 that appointment for a short period ( 89 days ) and termination of service at the end of the said period and reappointment after a gap of one day, such action of termination and reappointment repeated again and again for a period of about one and a half years, in such circumstances, the Hon'ble Supreme Court has held the termination not bona fide but adopted to defeat the object of the Act. Thus, it is not covered by section 2 (oo) (bb) of the Industrial Disputes Act, 1947. Their Lordships of the Hon'ble Supreme Court have held as under:

**“Section 2 (oo) (bb) of the Industrial Disputes Act reads as under:**

**“2. (oo) (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein.”**

**The respondent was appointed from time to time. Her services used to be terminated on the expiry of 89 days on regular basis. However, it is noticed that she used to be appointed after a gap of one or two days upon completion of each term. Such an action on the part of the appellant cannot be said to be bona fide. The High Court rejected the contention raised on behalf of the appellant herein stating:**

**“...It is not possible for us to accept the aforesaid plea raised at the hands of the management on account of the fact that the factual position, which has not been disputed, reveals that the respondent workman was repeatedly engaged on 89 days’ basis. It is, therefore, clear that the intention of the management was not to engage the respondent workman for a specified period, as alleged, but was to defeat the rights available to her under section 25-F of the Act. The aforesaid practice at the hands of the petitioner management to employ the workman repeatedly after notional break clearly falls within the ambit and scope of unfair labour practice.”**

In the present case also the petitioner was initially appointed for 89 days and after giving him fictional break, reappointed for another 89 days followed by one year appointment. This practice has been adopted by the management of respondent-corporation to defeat the provisions of section 25 (F) of the Industrial Disputes Act, 1947. The letter dated 29.3.2001 issued by the Managing Director to all the Divisional Manager of the corporation-respondent amounts to unfair labour practice.

The upshot of the above discussion is that the petitioner had completed 240 days before his retrenchment was effected. The learned Labour Court had come to a wrong conclusion that the case of the petitioner was covered under section 2 (oo) (bb) of the Industrial Disputes Act, 1947. The workman has been offered appointment with fictional breaks to prevent the petitioner from taking benefit of section 25 (F) of the Industrial Disputes Act, 1947. The appointment orders issued in succession to the workman was a camouflage to take out the petitioner-workman from the ambit of section 25 (F) of the Industrial Disputes Act, 1947. The appointment of the petitioner cannot be termed as contractual and his case will not fall under section 2 (oo) (bb) of the Industrial Disputes Act, 1947 and it will be covered under the expression 'retrenchment'. The act of the respondent-corporation of engaging the petitioner by giving fictional breaks was not bonafide.

According the writ petition is allowed. The award dated 13<sup>th</sup> December, 2003 is set aside. The workman is entitled to reinstatement with all consequential benefits with effect from the date of reference i.e. 4.9.2003 till the date of re-engagement. The respondent-corporation is directed not to give effect to letter dated 29.3.2001. The petitioner is also held entitled for costs, which are quantified at Rs. 3,000/-.

**( Rajiv Sharma), Judge**

May 28, 2007  
\*Awasthi\*